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Supreme Court U.S.
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No. 02-477

In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA,

Petitioner,

v.

DANIEL WEBSTER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondent Webster Greenthumb Co. shows that it is the only corporate respondent to the Petition, that it is a privately-held corporation, that it has no parent corporation, and that no publicly held corporation holds 10% or more of its stock.

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STATEMENT OF THE CASE

In 1995, Fulton County, Georgia, sought bids to have a tree removed from Mt. Paran Road. Webster Greenthumb, a small family-owned tree service, bid $2,500 to remove the tree. Ben's Landscaping bid $3,800 to cut down the same tree. Webster Greenthumb, which is owned and operated by a white couple (Daniel and Peggy Webster), had an excellent record of completing its jobs on time, in a safe manner, and cleaning up the job sites. Ben's Landscaping, which is owned and operated by an African-American man (Ben Edwards), had a poor performance history. The County awarded the contract to Ben's Landscaping, paying it $3,800 for a job that Greenthumb would have done for $2,500. (R1-1) The County offered no race-neutral explanation for its conduct.

Thereafter, in 1996, pursuant to its statutory bidding process, Fulton County awarded Webster Greenthumb a Purchase Order in the amount of $66,000 (the same amount as the previous year). Several weeks later, it summarily reduced the Purchase Order by $20,500 to $45,500. The sole reason for this reduction was to allow the County to increase the amount of work given to Ben's Landscaping, which received an increase in its annual Purchase Order in the precise amount of the reduction to Webster's Purchase Order – $20,500. (Plaintiffs' Trial Exhibits 203, 204, 380). Again, the reason for the award modification was undeniably race, whether in the form of meeting racial contracting goals or engaging in *ad hoc* remedial action in favor of Ben's Landscaping. (Pet. App. at 63-64.)

During this period, Fulton County[1] had in effect a published ordinance entitled "Minority and Female Business Enterprise Program" (hereinafter "MFBE Program") which gave preferences in contracting to businesses owned by women and members of certain minority ethnicities. The MFBE Program had "goals" of amounts to be awarded to minority businesses each year; by far the largest of these was a goal of awarding 26% of all county contracting to African-American businesses.[2] The MFBE Program was implemented and administered by Defendant Michael Cooper, the head of the County's Office of Contract Compliance. Cooper was responsible for ensuring that the percentages of the MFBE Program were met.

The Fulton County Department of Public Works wanted to award the Mt. Paran job to Webster Greenthumb, as the money came from its budget and Webster was not only less expensive, but also had a better track record for safe and efficient work. Michael Cooper essentially overruled them and required that the contract be awarded to Ben's Landscaping. (Similarly, it was Cooper who later intervened after the 1996 Purchase Orders were issued and required that the amounts be adjusted in favor of Ben's Landscaping.)

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[1] The Fulton County Commission acts as both the legislative and executive body for the County and passed the MFBE Program into law. A majority of the County Commissioners are African-American.

[2] Plaintiffs' Trial Exh. 1. The other racial goals were 1% Hispanic, 1% Asian, and 1% Native American. The African-American "goal" was artificially inflated and did not represent the amount of work a racially-neutral system of contracting would be expected to produce. 51 F.Supp.2d at 1377-78.

During this time, Cooper had received complaints from Ben Edwards that his business, Ben's Landscaping, was suffering race discrimination. This – a desire to remedy discrimination against Ben's Landscaping – was one of Cooper's stated reasons at trial for intervening in the two contracts, the other reason being a desire to meet the 26% African-American contracting goal of the MFBE Program. Practically the entirety of Edwards' evidence of discrimination was that he was black and that non-minority companies were getting more work than his was. There was no specific instance of discrimination identified, no evidence that discrimination had occurred, no hearing to determine the validity of Edwards' complaint, and no opportunity for Webster Greenthumb (or companies which had gotten whatever bids Edwards was complaining about) to participate. Furthermore, there was no attempt to find a remedy other than taking work away from Webster Greenthumb to give to Ben's Landscaping.

In fact, Ben Edwards was later found to have insufficient basis for a complaint of race discrimination. His complaint was groundless. He had been given full opportunity to bid on County work in the past and had received all work that he was entitled to, where he was the low bidder.

Based on these facts, in 1996 Webster Greenthumb filed suit in the Northern District of Georgia, demanding injunctive relief and damages for violations of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981. The district court bifurcated the trial process without objection. It determined that, first, it would hold a bench trial to decide the equitable issues, together with any facts necessary to its determination.

Afterwards, it would hold a jury trial to determine any damages to be awarded.

After the bench trial in 1999, the district court found that the Fulton County MFBE Program violated the Equal Protection Clause of the Fourteenth Amendment and entered a final judgment, enjoining Fulton County from considering race or gender in awarding County contracts. The district court decision was upheld in its entirety on appeal. *Webster v. Fulton County*, 51 F.Supp.2d 1354 (N.D.Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 1999), *r'hrg and r'hrg en banc denied*, 235 F.3d 1347 (11th Cir. 2000), *cert. denied,* 532 U.S. 942 (2001).

In 2000, the district court held the jury trial on Webster's damages claim. At the beginning of the trial, the court read to the jury a statement of undisputed facts previously entered into evidence during the bench trial. The court further informed the jury that it had held the MFBE Program to be unlawful, that this holding was binding on the jury, and that the jury therefore must accept that the MFBE Program was not a valid defense to race discrimination.

The jury found that both Fulton County and Michael Cooper had intentionally discriminated against Webster Greenthumb on the basis of race. It awarded actual damages of $8,750 against Fulton County and nominal damages of $1 against Michael Cooper. (Pet. App. at 63-65.)

The verdict form also had two interrogatories (#3 and #4) relating solely[3] to Cooper's claim of qualified immunity. (Pet. App. at 64.) In #3, the jury found that Cooper discriminated in order to meet the goals of the MFBE Program, and in #4, it found that Cooper discriminated in a good faith effort to respond to a non-frivolous complaint by another contractor (Ben's Landscaping) of discriminatory treatment. Based on these two interrogatories, the district court granted Cooper qualified immunity and voided the award of nominal damages against him, pursuant to Fed. R. Civ. Proc. 50(b).

Webster's Retaliation Claim

In 1997 Fulton County solicited bids for tree removal services in the amount of $250,000. Webster Greenthumb and Ben's Landscaping (among others) bid on the proposal, and Webster was the low bidder. Evidence from the Purchasing Department establishes that Webster Greenthumb was actually awarded the bid in the amount of $250,000 on March 6, 1997. Though the bid package was forwarded through appropriate channels for finalization, it simply disappeared. Webster was never awarded a Purchase Order for its successful bid. Notwithstanding the fact that Webster was the low bidder and Ben's Landscaping was not, Fulton County thereafter awarded Ben's Landscaping – and not Webster – an "Interim Purchase

[3] One can see from the verdict form itself that interrogatories #3 and #4 related solely to Cooper's qualified immunity defense. The jury was instructed to skip these questions unless it had found that Cooper was individually liable for discrimination against Webster. (Pet. App. at 63, final paragraph.)

Order for Tree Removal" in 1997 (using an "informal" process[4]) and assigned the work to him. (Plaintiffs' Trial Exh's 518 & 531-549)

Based largely on these facts, Webster Greenthumb amended its Complaint to include a count of retaliation, which amendment was accepted by the district court. Plaintiff's claim was that Fulton County refused to award this Purchase Order to it in retaliation for Plaintiff's assertion of rights under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981, *to-wit*, filing the initial lawsuit. On Defendant's motion, the district court dismissed the retaliation claim prior to trial as a matter of pure law. (Pet. App. at 48-49).

The Eleventh Circuit Court of Appeals reversed the dismissal, holding that the County would be liable in damages for refusing to enter into a contract with Webster Greenthumb, if the refusal were based on retaliation against Webster Greenthumb for attempting to enforce rights guaranteed by the Equal Protection Clause and 42 U.S.C. § 1981. (Pet. App. at 2.)

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[4] That is, a Purchase Order bypassing the formal bidding process and eliminating the opportunity for other persons (specifically Webster) to place a lower bid.

ARGUMENT

I. A. The Eleventh Circuit's Holding, That Webster Greenthumb Stated a Valid Claim for Retaliation under 42 U.S.C. § 1981, Does Not Conflict with *Board of Commr's v. Umbehr*.

The Petition articulates the first "question presented" as follows:

> I. Whether the Eleventh Circuit's holding, that respondent, as a "disappointed bidder," stated a claim for retaliation under 42 U.S.C. § 1981, is in conflict with the limited nature of this Court's decision in *Board of Comm'rs v. Umbehr*.

(Pet. at i.) The answer to this question is authoritatively provided in *Umbehr* itself, and the answer is "no":

> Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, **we need not address** the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.

Board of Comm'rs v. Umbehr, 518 U.S. 668, 685 (1996) (emphasis added). The Eleventh Circuit's holding cannot possibly conflict with *Umbehr* on an issue that *Umbehr* did not address.

At one point, Fulton County actually torpedoes its own position, admitting that the current question "was therefore unresolved [by *Umbehr*]. WGT's retaliation claim now presents the issue that was previously left open." (Pet. at 12.)

The County then returns to a lengthy line of argument that it had just admitted was invalid:

> The Court of Appeals held that *Umbehr* was not applicable. . . . This is a distinction without a difference, however, because both situations involved a governmental entity allegedly punishing a bidder or applicant for engaging in some sort of protected activity. **There is simply no logic in denying disappointed bidders the opportunity to enforce a constitutional right under the First Amendment, while granting them the opportunity to enforce a** statutory right under § 1981, and the Eleventh Circuit should have applied *Umbehr*.
>
> Moreover, the Eleventh Circuit recently decided another case **in which it further eroded the limitation articulated in *Umbehr***.

(Pet. at 12-13, emphasis added.)

"Eroded the limitation"? This Court's announced refusal to decide an issue not before it hardly constitutes precedent which can be "eroded". This Court has never "den[ied] disappointed bidders the opportunity to enforce a constitutional right under the First Amendment" by filing a retaliation suit, and specifically did not do so in *Umbehr*. On the contrary, the *Umbehr* Court went out of its way to forestall the argument presented in Question I, and it is thus hard to find the least scrap of support for the Petitioner's argument.

B. *McClintock v. Eichelberger* Is Not Precedent for Any Issue in This Case.

Although the matter is not raised in the Questions Presented, Fulton County argues that the present case conflicts with *McClintock v. Eichelberger*, 169 F.3d 812 (3d Cir. 1999). No such conflict exists. The language in *McClintock* upon which the County relies comprises *dicta*. The dispositive (and therefore precedential) holding of the Third Circuit was that the plaintiff had failed to plead the matter in the district court and had thus failed to preserve the issue for appeal.

> In their brief in this court, appellants once again contend that '[e]ven assuming that this Court finds that [they] do not have the same status as the plaintiffs in *Umbehr* and *O'Hare*, [they] are nonetheless entitled to protection from government retaliation for exercise of their First Amendment rights.' We, however, **will not entertain this argument as appellants did not plead it** as the basis for relief in their complaint. Accordingly, we will affirm the order of the district court. . . .

169 F.3d at 817.

Having refused to entertain the argument and having affirmed the district court's decision, however, the Third Circuit proceeded to state that "even if [it] entertained" McClintock's substantive argument, it would hold that such a claim would fail.

The Respondent believes that statements following full disposition of the cause must be considered *dicta*. Having decided the case, an appellate court may not create precedent on an issue unnecessary to reach its decision, a

point of jurisprudence demonstrated by this Court's restraint in *Umbehr*.

C. The *McClintock Dicta* Do Not Conflict with the Holding of the Eleventh Circuit.[5]

Webster's retaliation claim seeks to protect his ability to seek redress for violations of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981. *McClintock*, however, was a First Amendment case. It did not discuss "retaliation" under 42 U.S.C. § 1983 in a broad sense and did not base its reasoning on whether or not retaliation for the exercise of Constitutional rights should generally state a cause of action, or not. It was, rather, concerned with considerations peculiar to First Amendment litigation that would not control – or even be appropriate to the discussion of – a Fourteenth Amendment race discrimination case.

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[5] Because *Umbehr* explicitly did not address the issue of retaliation accomplished by refusal to "make" contracts, Respondent will not waste space arguing the differences between retaliation for free speech and retaliation for filing an equal protection lawsuit, in the context of this Court's previous decisions. The issue simply is not ripe. The purpose of this Section of the Argument is simply to demonstrate the fallacy of assuming that the Third Circuit would necessarily repeat the *McClintock dicta* as the controlling rationale in an equal protection case.

The Respondent, however, by reference to this section of the Response, reserves the argument that *Umbehr* (or any previous or subsequent First Amendment case) is not contrary precedent for cases seeking to protect a person, who has attempted to enforce rights guaranteed by the Equal Protection Clause, from governmental retaliation.

The very foundation of the *McClintock* holding is a concept largely foreign to equal protection:

> In *Horn v. Kean,* 796 F.2d 668, 678 (3d Cir. 1986) (in banc), we cautioned against extending First Amendment holdings if they would cause the judiciary to 'intrude itself into such traditional practices as contract awards by the government's executive. . . . '

169 F.3d at 817.

The Third Circuit's attitude toward governmental contracting decisions which are purposefully race-conscious – which on their face appear to violate the Equal Protection Clause – is entirely different. Once a court is convinced that a government is openly using race as a deciding factor in awarding contracts, it will have no hesitation to "intrude itself", unless the government's conduct can survive the court's strict scrutiny as to the evidentiary basis for believing relief is required, and the need to use a race-conscious remedy as a means of providing relief. *E.g. Contractors Ass'n of Eastern Pennsylvania v. Philadelphia*, 91 F.3d 586 (3d Cir. 1996). *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

A second distinction between the First Amendment and the Equal Protection Clause appears in the second stated basis for the Third Circuit's reasoning in *McClintock*. It considered that

> it is difficult for a court to predict what the consequences would be on political activity if the First Amendment protections are extended beyond the *Umbehr* and *O'Hare* boundaries. Perhaps the extension even would discourage political activity.

169 F.3d at 817. That is, elected officials have their own competing needs which must be weighed against an individual's First Amendment rights, such as the needs to exercise untrammeled free speech in the hurly-burly of the political arena, to avoid having a dissident employee's speech from being attributed to the official himself, and to accomplish the purposes of government in an efficient manner. *See, e.g., Pickering v. Bd. of Ed. of Township High School Dist. 205,* 391 U.S. 563, 568-69 (1968); *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 518 (1980). *See also United States v. Treasury Employees*, 513 U.S. 454, 475 (1995).

The rationale stated to support the *McClintock dicta* simply do not apply to a case pleading retaliation to chill the exercise of equal protection rights, and there is no reason to speculate that the Third Circuit would find them persuasive. It is hardly "difficult for a court to predict" the consequences of allowing governments to blacklist contractors challenging race-conscious affirmative action statutes – a baleful dampening of such lawsuits and a subsequent denial, in practice, of equal protection in governmental contracting. Unlike the tension between the First Amendment rights of an elected government official and a bidder for government contracts, there is neither a positive ideal to be pursued, nor a legitimate state interest to be protected, by governmental retaliation against a contractor who seeks equal treatment due to his race.

It is important to remember that this is a retaliation claim. Governments certainly have "competing rights" in the base litigation of the legality of an affirmative action program – most obviously, the right and duty to end their participation in race discrimination. In the context of **retaliation**, however, the only competing interest is one

the courts will hardly applaud: avoiding federal judicial scrutiny of governmental race preferences.

There is another, very different, reason to suspect that the Third Circuit would not differentiate cases involving the termination of existing contracts from cases involving the making of new contracts under 42 U.S.C. § 1981: The statute itself. In 1991, Congress amended § 1981 to include the following language:

> (b) "Make and enforce contracts" – defined.
>
> For purposes of this section, the term "make and enforce contracts" includes the making . . . of contracts. . . .

42 U.S.C. § 1981(b). By adding this provision to § 1981, Congress' very purpose was to forestall differentiation between "making" and "maintaining" contracts, for purposes of § 1981 enforcement. *See e.g. Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

The Third Circuit has not had an opportunity to discuss these powerful impediments to analogizing *McClintock* to an equal protection case and until it does, one must conclude that, given the chance, it would most likely agree with the Eleventh Circuit. At the very least, any deduction concerning the Third Circuit's attitude towards the issue presented in this case is speculative.

II. The District Court Correctly Instructed the Jury Regarding Intent.

III. "Good Faith" Is Not a Defense to Intentional Governmental Race Discrimination.

A. Introduction.

Respondent has consolidated its Response to Questions II and III in the Petition, as well as the County's argument made in pages 3-6 of the Petition's "Statement of the Case", because these arguments represent variations on a single theme.

The very first paragraph of Fulton County's Statement of the Case (Pet. at 3) shows the fatal flaw that runs throughout the Petition. The "serious dilemma" Fulton County claims to suffer is that it was not allowed to award two county contracts on the basis of race, even if the awards were a "good faith" response to a "credible[6] complaint of race discrimination". (*Id.*) This Court, however, has repeatedly and clearly held that such nebulous and permissive standards will not support governmental race preferences. Strict scrutiny is required. If a county seeks to defend a race-based preference on the ground that the preference is remedial, it must meet two stringent standards.

First, it must provide the court with a "strong basis in evidence" that the favored race is suffering discrimination tied to the county's actions. *E.g. Wygant v. Jackson Bd. of*

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[6] The county's use of the term "credible" is its own invention. The term in the record is "non-frivolous", a much lower standard. See Pet. App. at 64.

Educ., 476 U.S. 267, 277 (1986). Fulton County's plea that it should be allowed a defense based on a "non-frivolous complaint of discrimination" is the polar opposite of the "strong basis in evidence" of discrimination against the favored race, which strict scrutiny requires.

Second, it must demonstrate that the remedy is "narrowly tailored"[7] to achieve a specific remedial goal, which involves a number of factors, such as "the necessity for the relief", "the efficacy of alternative remedies", "the flexibility and duration of the relief", and "the impact of the relief on the rights of innocent third parties." *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997). It must, most importantly, demonstrate full "consideration" of remedies other than racial preferences and give reasons why they have not been effective. *Id.* Fulton County proffered no evidence whatsoever that discrimination against Webster was "narrowly tailored", nor did it argue such. Racial discrimination in favor of the minority contractor was the first and only relief considered.

Fulton County's "good faith" standard, which it asserts should obviate the narrow tailoring requirement, is even more lenient that the "reasonableness standard" rejected in *Wygant:*

> The Court of Appeals examined the means chosen to accomplish the Board's race-conscious purpose under a test of "reasonableness". That standard has no support in the decisions of this

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[7] *E.g. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989).

> Court. As demonstrated in Part II above, our decisions always have employed a more stringent standard. . . .

476 U.S. at 278-79.

The only dilemma faced by Fulton County is that it does not want to obey the law expounded by this Court.

B. The District Court Correctly Instructed the Jury Regarding Intent.

After the jury was sent out for deliberations, it sent a note to the district court requesting clarification of the legal meaning of "intent". The context of the request made it apparent that the jury was primarily confused as to whether animus was a required element of intent.[8] Fulton County, misappropriating language from disparate impact cases, asked the district court to instruct the jury that discriminatory "intent" could be proven only by showing the County intended to have "an adverse effect" on white people. In context, the jury would have undoubtedly construed this language as a requirement of ill-will or hostile animus. In effect, the County tried to introduce a "good faith" defense through the back door.

Webster thus asked the district court to instruct the jury that discriminatory "intent" could be proven by

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[8] Most likely, the jury's confusion stemmed from the language of Interrogatory #4 (Pet. App. at 63) – a question intended to be answered after, and only if, the jury had found that Cooper individually intentionally discriminated against Webster due to his race. Interrogatory #4 related only to Cooper's defense of qualified immunity. See Section C, directly below.

showing that the defendant intended to prefer one person over another, because of their respective races, whether or not the defendant showed overt *hostility* to one race. The district court fashioned a response which clearly defined the meaning of "intent" in a case of disparate treatment due to race, with an explanatory sentence confirming that hostile animus is not an element of "intent" in such a case.

The district court and court of appeals were entirely correct. "Hostile animus" has never been required by this Court as an element of proof in opposing openly race-conscious governmental contracting. In *Goodman v. Lukes Steel Co.*, 482 U.S. 656 (1987), this Court found that a union had intentionally discriminated against black employees in violation of 42 U.S.C. § 1981, because it had premised its decisionmaking on race, even though "there was no suggestion that the [defendant] held any racial animus against or denigrated blacks generally." 482 U.S. at 668.

The Eleventh Circuit has summed up the rule succinctly: "[R]acial animus and intent to discriminate are not synonymous. [fn. 7] In other words, ill will, enmity, or hostility are not prerequisites of intentional discrimination [under § 1981]." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472-73, 473 n. 7 (11th Cir. 1999).

The County cites *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) – an adverse impact case – not for any actual holding considered and then stated by the Court, but because the language used in *Feeney*, when transplanted to a disparate treatment case without modification, gives

the mistaken impression that a decision **openly based on race** is legal, as long as the defendant's motive was "benign"[9] – that is, as long as the defendant's purpose was to have a beneficial effect on the favored race, rather than to have an adverse effect on non-favored races.

The issue actually addressed by the *Feeney* Court was whether a non-discriminatory law with a predictable discriminatory effect against women would be unlawful *per se*, on the one hand, or whether it would be held unlawful only if the legislative purpose was gender discrimination, on the other. That is, whether the legislature intended to pass the law granting legitimate preferences to veterans *in spite of* a discriminatory effect, or *because of* its discriminatory effect. The decision has no relevance to a case like the present one, where "because of race" is the very standard announced by the court.

The Court neither considered nor answered the issue raised by Petitioner Fulton County; nor could it. The language that *Feeney* was concerned with – and the authority of its holding – was the difference between "because of" and "in spite of". *Feeney* did **not** intend to

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[9] In effect, the County wants to reopen a hidden defense of benign discrimination, long discredited in this Court: "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. See *Weinberger v. Wiesenfeld*, 420 U.S. at 648, n. 16. . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The weakness of the defense is compounded by the racial composition of the Fulton County Commission. *Cf. Croson*, 420 U.S. at 495-96 ("The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.")

differentiate between the concept of "adverse effect" on one gender as opposed to the concept of "preferential beneficial effect" on the other gender, nor is it instructive whatsoever where the **stated purpose** of the government's action is the favoritism of one person over another "because of" their races.

C. The Issue of a "Good Faith Defense" Is Not Properly Presented by the Petition.

Fulton County claims that it should be excused from intentional race discrimination because the jury found that a co-defendant, Michael Cooper, did "intentionally discriminate against the Plaintiff on grounds of race in a good faith effort to respond to a non-frivolous complaint by another contractor of discriminatory treatment." The Petition, however, fails to recite facts that would be required as a foundation to support review of the third Question Presented – specifically, facts demonstrating that the County advanced "good faith" as a substantive defense to County liability, that it asked the district court to charge the jury concerning the substantive defense of "good faith", that the district court refused to give the instruction, or even (since the jury found that Cooper's immediate purpose was, at least in part, to implement the unlawful racial goals of the MFBE Program) that the alleged error was harmful.

Interrogatory #3 applied solely to co-defendant Cooper and applied solely to the issue of qualified immunity.[10] Fulton County cannot enjoy qualified immunity, a defense applicable only to individual defendants. *E.g. Doe v. Sullivan County*, 956 F.2d 545, 554 (6th Cir. 1992). The interrogatory, and its answer, have nothing to do with the substantive issue of whether Cooper (much less the County) intentionally discriminated against Webster Greenthumb on account of Daniel Webster's race.[11] That

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[10] The jury awarded nominal damages of $1 against Cooper. The trial court later entered a defense verdict in Cooper's favor pursuant to Fed. R. Civ. Proc. 50(b).

Respondent Webster Greenthumb objected to the inclusion of the "good faith" interrogatory on the jury form even concerning Cooper's immunity claim, as it does not believe Cooper would be entitled to immunity from a conscious act of race discrimination against Webster, simply because he thought in "good faith" that someone had previously discriminated against Ben's Landscaping. Proof of qualified immunity has no such subjective component (*see Harlow v. Fitzgerald*, 457 U.S. 800 (1982)), unless subjective motive is a substantive defense. *Crawford-El v. Britton*, 523 U.S. 574 (1998). But, as shown below, "good faith" is not a defense to *per se* race discrimination by a state actor. At no point did Cooper claim that he would have made the same decision absent the component of race. There was simply **no** "motivating factor other than race" claimed or proved.

Respondent did not appeal Cooper's dismissal or the court's inclusion of Interrogatory #4 on the verdict form, however, for three primary reasons: 1) it believed Cooper had other, more colorably valid grounds to support a finding of qualified immunity, 2) Webster's chances of obtaining punitive damages against Cooper were not great enough to justify the cost of the appeal, and 3) Other than punitive damages, Webster obtained full relief from the County. Nevertheless, Webster contends that the jury's response to this interrogatory was entirely irrelevant to any issue in the case.

[11] In this regard, it is critical to note the exact language of the interrogatory: "Did the Defendant Michael Cooper **intentionally discriminate against the Plaintiff on the grounds of race** in order

(Continued on following page)

jury answered that question in Interrogatory #2. (Pet. App. at 63.)

Whether or not a government might enjoy a defense of "good faith", where it has committed an act of racial discrimination to remedy what it considers in good faith to be discrimination in favor of another race, is thus irrelevant to the outcome of this case. The district court properly instructed the jury:

> If you find that the Defendant Fulton County would have, more likely than not, made the same contracting decisions concerning the plaintiff even if the unlawful motive was not present, the plaintiff is not entitled to damages with respect to such an action where there were motivating factors other than race.

(Doc. 294-Pg. 19). The jury found, thus, that neither Cooper nor the County would have made the same contracting decisions except for the race of the two contractors and its verdict was both correct and consistent.

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to. . . ." (Pet. App. at 64, emphasis added.) What it does **not** say is that "Defendant Cooper acted not on the basis of race, but instead . . . ," or, as misstated in the Petition, "Faced with Edwards' complaint, the jury found that Cooper acted in good faith to remedy it." (Pet. at 23.) The verdict will not support any inference that Cooper took his "remedial" action with a non-discriminatory motive, such as doing so as part of a racially-neutral program of remedying discrimination. Yes, Cooper was concerned "in good faith" with remedying discrimination, **but only discrimination against African-Americans**. One must note, in this regard, the difference between the County's eagerness to remedy an unsupported complaint of race discrimination made by Ben Edwards, compared to its utter intransigence in response to a valid complaint of discrimination from Daniel Webster. *Res ipsa loquitur.*

D. "A Good Faith Effort to Respond to a Non-Frivolous Complaint of Discrimination" Does Not Constitute a Defense to Intentional Race Discrimination.

The County asks this Court to ignore hundreds of previous cases requiring courts to engage in strict scrutiny of affirmative action, and hold that a governmental actor can choose its contractors by race – on an *ad hoc* basis! – as long as it is "responding in good faith" to a "non-frivolous" complaint of race discrimination, without offering any evidence that the discrimination occurred or that another remedy was inadequate to resolve it. In an individual case, it would replace the "strong basis in evidence" required by this Court with almost the weakest level of evidentiary burden possible: "non-frivolous". It would entirely eliminate the requirement of "narrow tailoring". And to top off the cake, it would promote such a defense in the face of an established motive of furthering an illegal racial goal.

The Petitioner even has the temerity to cite *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), as **supporting** the proposition that a government has a "good faith" defense to intentional race discrimination! The central holding of *Wygant* is the very opposite. *Wygant*'s primary holding was to establish a much higher standard of proof to be met by a governmental actor prior to engaging in "remedial" race discrimination.

Wygant considered the possibility that a public school board could show preference to minority employees during layoffs, if it "reasonably" believed that the minority was under-represented in the workforce due to previous discrimination in hiring. The Court concluded that the school board could not, and announced that such "remedial

discrimination" would be subject to strict scrutiny. The discriminating actor's "good faith" belief that it had previously discriminated against the race now favored simply does not present a sufficient defense to a suit under the Equal Protection Act. Rather, the state actor committing discrimination is required to show "convincing evidence that remedial action is warranted" (476 U.S. at 277) and, **in addition**, show that the remedy for such prior discrimination is "narrowly tailored", with full consideration of the possibility that a non-race-conscious remedy might have remedied the situation. *E.g.* 476 U.S. 279-280 and n. 6.

The bottom line is that the *Wygant* Court rejected, as insufficiently strict, a stronger defense than the "good faith" defense espoused by Fulton County:

> The Court of Appeals examined the means chosen to accomplish the Board's race-conscious program under a test of 'reasonableness.' That standard has no support in the decisions of this court.

476 U.S. at 275. Fulton County seeks to find support in *Wygant* for a "good faith" and "non-frivolous" defense which must be considered even more lenient than a "reasonableness" test. Its Petition on this issue falls far short of showing grounds for a writ of certiorari.

E. The County's "Dilemma" Is Self-Imposed.

Fulton County laments that it had one complaint of race discrimination from a black vendor (Ben's Landscaping) and another complaint of discrimination from a white vendor (Webster Greenthumb), in the same category of contracting, tree removal services. Therefore, the County

argues, "The only way for the County to have avoided liability in both cases was for Cooper to guess[12] correctly in advance of litigation which contractor would ultimately be held to have a valid complaint and to remedy only that contractor's claim." (Pet. at 23.)

Only willful blindness could account for such a string of absurd propositions. The County could easily have handled the complaint from Ben's Landscaping without committing a second, clearly discriminatory, act.

In the first place, it could pass a statute prohibiting race discrimination![13] When Mr. Edwards complained, the County could have gathered evidence. It could have held hearings. It could have made formal or at least informal findings of fact. It could simply have paid Ben's Landscaping $1,300 while giving Webster Greenthumb the Mt. Paran contract, spending the exact same amount of money without committing discrimination against Webster. It could simply adopt and follow a policy of giving bids to the lowest qualified bidder regardless of race. It could appreciate the simple distinction between Edwards' vague and unsupported complaint, and its own intentional award of work based on the bidders' races. If the County itself **really** thought it had discriminated against Ben's Landscaping, it could pay damages in settlement of the case

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[12] The fact that Cooper apparently "guessed" that the minority company had suffered discrimination and the non-minority company had not, despite strong contrary evidence, speaks for itself.

[13] Remarkably, Fulton County had not even passed an ordinance prohibiting race discrimination in contracting or subcontracting, much less a procedure for determining the validity of such complaints.

and insure that no race discrimination occurred in the future. And so on.

One must suspect the County's very credibility in its complaint of a dilemma. It has engaged in extensive and protracted litigation against Webster over a claim for roughly $10,000, while its response to Ben Edwards was an immediate attempt to find a monetary remedy, prior to any sort of adequate investigation.

One thing is certain. If the County thought there was valid reason to believe it had discriminated against Ben's Landscaping – which, as it turned out, it did not – the solution is not to turn around and "remedy" the unproven allegation by openly discriminating against an innocent white bidder in a later contract. Affirmative action must be the last line of defense to proven discrimination, not the first reaction to an unproven allegation. *E.g. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The County has nobody to blame but itself. Its "dilemma" is entirely a self-inflicted injury.

IV. The District Court Was Required to Instruct the Jury that the MFBE Program Was Unlawful, to Prevent Inconsistent Verdicts.

The last of the County's "Questions Presented" hardly even pretends to state grounds for certiorari. It seeks nothing more than another appeal of the application of well-established law to the facts of the case.

The County's MFBE Program was unlawful. The matter was decided in a prior trial, the verdict was affirmed by the proper court of appeals, and this Court denied a petition for certiorari.[14] The parties at the jury trial were the same as the parties at the bench trial; the case was the same case; the MFBE Program was the same program. The precise issue – the legality of the Fulton County MFBE Program – had been subject to a final verdict.

Under the law of the case doctrine, "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial or on a later appeal." *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994) (citations omitted). *See Epic Metals Corp. v. Souliere*, 181 F.3d 1280 (11th Cir. 1999).

The district court's instructions concerning the MFBE Program were not only *correct* under the law of the case doctrine, but were also *required* to prevent an inconsistent verdict. The jury was legally bound to follow the prior decision. It thus had to be informed of both the decision and the legal implications stemming from it. To leave the jury in the dark would have served no purpose except to spawn a mistrial.

Apparently, the County would have had the jury return a verdict in its favor on grounds that the MFBE Program was legal; but the law of the case doctrine (not to

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[14] *Webster v. Fulton County*, 51 F.Supp.2d 1354 (N.D.Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 1999), *r'hrg and r'hrg en banc denied*, 235 F.3d 1347 (11th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001).

mention the doctrine of issue preclusion) forbids this. One might find grounds supporting a petition for certiorari if the circuits were in conflict about the application of the law of the case doctrine or this Court had previously held that the law of the case doctrine is flawed. Fulton County, however, makes no such argument.

The argument in Section IV of its Petition, instead, argues that the courts below somehow contravened *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). It is hard to glean exactly what the County is talking about. The County's cries of a "presumption" in Plaintiff's favor is not supported by any record citation. The district court placed the burden of proof entirely on the Plaintiff for all issues the jury was authorized to decide.

Concerning the evidentiary issues, an individual may often, within the primary discretion of the district court, introduce evidence of other incidents of discriminatory conduct to prove pretext. "Other evidence that may be relevant to any showing of pretext includes facts as to . . . [the defendant's] general policies and practices with respect to minorities." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973). In the present case, the district court admitted some such evidence and disallowed other such evidence, depending on how relevant to issues in Webster's case it considered the specific evidence to be. (*E.g.* Pet. App. at 60.) Concerning the evidence that was admitted, the County has had its argument heard by the district court (which also upheld many of the County's evidentiary objections), and has had its appeal on the admission of evidence heard by the Eleventh Circuit. Its inclusion here is, purely and simply,

an attempt to appeal, again, the application of established law to the facts of the case.

CONCLUSION

In the quagmire of issues raised in the Petition, only one – the first – suggests a question potentially appropriate for this Court's review at some time in the future. The written portion of the Eleventh Circuit's decision is a case of first impression in the appellate courts: whether 42 U.S.C. § 1981 will support a cause of action for governmental retaliation against a citizen's efforts to protect his rights under the Equal Protection Clause, where the retaliatory act is the government's refusal to enter into a contract with such person. The Petition's first "Question Presented" does not show any disagreement with this Court's prior decisions, or conflict among the circuits, or major issue of national significance, or any other reason why it is appropriate for review by the Supreme Court of the United States.

This Court may be called upon to resolve this issue at some point. Equally possible, it may never need address the issue. At this time, with only one circuit having decided the issue, it would certainly be premature.

The other three Questions ask for nothing more than another appeal claiming "the misapplication of a properly stated rule of law." The court of appeals did not even see a need to issue a written decision on these issues, and it therefore summarily affirmed the district court's careful

and well-reasoned holdings. Respondent Webster Greenthumb therefore asks that the Petition be denied.

Respectfully submitted,

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